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June 8, 2011

Mr. Gary Goldsmith  
Campaign Finance and Disclosure Board  
Centennial Office Building  
658 Cedar Street, Suite 190  
St. Paul, MN 55155-1603  
651-296-5148

Re: Minnesota Family Council

### **Minnesota Family Council's Response to Common Cause Complaint**

Dear Mr. Goldsmith:

This letter is in response to your letter of April 15, 2011 to the Minnesota Family Council (hereinafter "MFC") and concerns the complaint filed against MFC with the Minnesota Campaign Finance and Public Disclosure Board by Common Cause.

Attached to this letter are transcripts of radio and television communications published or broadcast in Minnesota by MFC and the National Organization for Marriage (hereinafter "NOM") in 2010. Also attached is an invoice indicating the approximate cost and air dates for each of the ads. Audio and video of the television ads is included on the attached CD.

For the following reasons, MFC did not violate Minn. Stat. 10A.04(6) by failing to include expenditures related to the advertisements in its principal report:

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PUBLIC DISCLOSURE BOARD

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***MFC did not pay for the ads.***

As indicated in the attached invoice, all of the costs for creating, producing, and broadcasting the advertisements in question were made by NOM, not MFC. MFC has not agreed or obligated itself to reimburse NOM for any costs related to the advertisements, nor does it have any intention of doing so. While the advertisements stated that the broadcasts were paid for by NOM and MFC, in fact all expenditures of funds were made not by MFC but by NOM. For this reason, no expenditures relating to these broadcasts were required to be included in MFC's principal report, nor in the reports of MFC's designated lobbyist.

***The ads did not urge communication with a public official.***

Further, the radio and television advertisements broadcast by the NOM and MFC in 2010 do not fall within Minnesota's definition on several grounds. Under Minnesota law, lobbying is defined as "attempting to influence legislative action, administrative action, or the official action of a metropolitan governmental unit by communicating with or urging others to communicate with public officials or local officials in metropolitan governmental units. Any activity that directly supports this communication is considered a part of lobbying." Minn. Rules Part 4511.0100, subp. 3.

To constitute lobbying, a given broadcast must attempt to influence legislative action "by communicating with or urging others to communicate with public officials." Minn. Rules Part 4511.0100, subp. 3. The advertisements, however, do not urge viewers to contact public officials regarding any legislative matter. Two of the ads ("It's Your Right to Vote" and "Minnesota's Next Governor") state that "when the candidates for governor ask for your support, ask them if they'll guarantee your right to vote on marriage." These statements are insufficient to bring the advertisements within the meaning of Minnesota's lobbying definition. The statements do not urge viewers to contact anyone. Rather, the ads suggest that if a gubernatorial candidate initiates contact, they should respond by asking that candidate his position on a particular issue.

***Candidates are not public officials under the lobbying definition.***

Even assuming arguendo that the ads do urge communications with candidates for elective office, the ads cannot constitute lobbying as candidates for governor do not qualify as "public officials" for purposes of Minnesota's lobbying requirements. An exhaustive list of individuals who constitute public officials for purposes of Minnesota's lobbying statutes is given in Minn Stat. 10A.01(35). This list does not include candidates for public office.

***The ads did not attempt to influence legislative action.***

In addition, the advertisements do not fall within Minnesota's lobbying definition as they were not made for the purpose of "attempting to influence legislative action, administrative action, or the official action of a metropolitan governmental unit." Minn. Rules Part 4511.0100, subp. 3. The radio and television broadcasts in question were made in the context of an election campaign for Minnesota governor, and were aimed at informing the electorate about the position of candidates for governor on issues related to same sex marriage. At the time the ads were broadcast, the Minnesota legislature was not in session and no legislation regarding a ballot initiative on same sex marriage in Minnesota was pending in the legislature.

One of the ads ("It's Your Right to Vote") makes reference to SF 120, a bill to legalize same sex marriage in Minnesota. This reference, however, is made only in the course of providing background on the marriage issue in Minnesota. The advertisement does not request viewers to contact their representatives regarding SF 120, and at the time the ad was broadcast SF 120 was no longer before the Minnesota legislature. None of the other advertisements makes reference to any specific legislation.

***Applying the lobbying definition to the ads raises serious constitutional concerns.***

In addition to Minnesota's lobbying definition, the phrase "to influence" appears in Minnesota's definition of "political committee," which is defined as "an association whose major purpose is to influence the nomination or election of a candidate or to promote or defeat a ballot question." Minn. Stat. 10A.01(27). In 2005, the Minnesota Supreme Court narrowly construed the "to influence" language of Minnesota's political committee definition to include only "groups that expressly advocate the nomination or election of a particular candidate or the promotion or defeat of a ballot question." *Minnesota Citizens Concerned for Life v. Kelley*, 698 N.W.2d 424, 430 (Minn. 2005). According to the Minnesota Supreme Court, this narrow construction was adopted to ensure that the definition was not unconstitutionally overbroad or vague. *Id.* In so holding, *Kelley* cited the United States Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), which narrowly construed the phrase "for the purpose of influencing" in the Federal Election Campaign Act ("FECA") to mean "expressly advocate" to avoid constitutional overbreadth and vagueness concerns. *Kelley*, 698 N.W.2d at 426 (citing *Buckley*, 424 U.S. at 77-80).

Similarly, the phrase "to influence" in Minnesota's lobbying definition must be narrowly construed so as to avoid constitutional concerns. To broadly apply the words "to influence" in Minnesota's lobbying definition while narrowly applying the same words in the political committee and campaign expenditure definition is not only incongruous, but would run afoul of the protections given to campaign speech in *Buckley* and later cases. If a state may not regulate an advertisement as an electoral communication (on the grounds that it does not include express

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advocacy), then it cannot apply the same sort of regulatory burdens on the same communication simply by reclassifying it as lobbying.

***Intent may not be considered in evaluating the ads.***

Finally, the Campaign Disclosure Board has asked MFC to submit its legal position on “whether the intent of the communication(s) may be considered when making the determination of whether the communications constituted lobbying.” NOM and MFC’s intent in making the broadcasts was most certainly not to influence legislative action by communicating with or urging others to communicate with public officials. Nonetheless, the United States Supreme Court has clearly stated that a regulation of speech “must be objective, focusing on the substance of the communication rather than amorphous considerations of *intent* and effect.” *FEC v. Wisconsin Right to Life*, 546 U.S. 551 U.S. 449, 451 (2007) (emphasis added) (citing *Buckley*, 424 U.S. 43-44). An intent-based standard “blankets with uncertainty whatever may be said,” and “offers no security for a free discussion.” *Buckley*, 424 U.S. at 43. As such, the Board determination must be based on the objective content of the advertisements, rather than any speculation as to the intent behind the ads.

Sincerely,

BOPP, COLESON & BOSTROM

A handwritten signature in black ink, appearing to read 'Barry A. Bostrom', written over a horizontal line.

Barry A. Bostrom  
Josiah Neeley